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Riparian Ownership in Lakes and Ponds

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RIPARIAN OWNERSHIP IN LAKES AND PONDS.

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INTRODUCTION.

A lake is defined by Webster as being a large body of water, contained in a depression in the earth's surface, and supplied from the drainage of a more or less extended area. A pond is defined by the same author as a body of water, naturally or artificially confined and usually of less extent than a lake. Angell, in his work upon Riparian Rights, defines a pond as a lake of small size. In State vs. Gilman, 14 N. H. 467, Gilchrist, J., sums the matter up as follows: "The material difference between a lake and pond is in size; the distinction, however, as applied to artificial ponds, is somewhat indefinite. The word pond may mean a natural pond or an artificial one, raised for manufacturing purposes, either permanent or temporary. In both cases the limits of such bodies of water may vary at different times and seasons by use or natural causes. Therefore, different rules of construction may apply in different jurisdictions. " However, as the subject of artificial ponds will not be touched upon in this thesis, it will

be unnecessary to go further into that particular branch. "The mere fact that there is a current from a higher to a lower level, does not make that a river which would otherwise be a lake, and the fact that a river swells out into broad, pond like sheets, does not make that a lake which would otherwise be a river. Where it is admitted that the water is not a lake nor a pond, the material difference between which is size, the only criterion by which to determine whether it is a river, is the existence of a current. The question cannot be determined by ascertaining what appellation has been given it; the name cannot alter the thing." It seems, therefore, that the main test to distinguish between a lake and pond is the question of size.

CHAPTER I.

Did priority of occupation give superior right, at common law ?

It may perhaps seem that the discussion which follows upon the common law doctrine of prior appropriation as giving one an exclusive right to the use of waters, applies only to running streams, and not, therefore, to bodies of still water such as lakes and ponds. Such, however, is not the case. Owing to the peculiar nature of the country, there are but few strictly non-tidal lakes to be found in England. There is, therefore, but little very early law bearing directly upon the subject, and at this late day, as will be seen later, the question as to the title to land under lakes and ponds has never been directly settled. I think, therefore, that the discussion which follows will apply as well to lakes and ponds as to running streams.

The doctrine that one may acquire an exclusive right to the use of a lake or stream of water in a particular manner or to a particular extent, by mere prior appropriation of it, was at one time quite well founded in the early English law. One of the earliest cases was

that of Williams vs. Moreland, 2 B & C 913, decided in 1824. The plaintiff in this case was the owner of certain land, by reason of which he was entitled to the use of a stream of water running through the property and used by him for domestic purposes. The defendant erected a dam higher up the stream and diverted the water from its usual course, thereby injuring the plaintiff. Bailey, J., in delivering the opinion of the Court: "My judgment in this case is founded upon the nature of water, and the manner in which an exclusive right to its use is obtained. Water is publici juris. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains publici juris. The party who obtains the right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the character of the right to water, a party complaining of the breach of such right ought to show that he is prevented from having water which he has acquired the right to use for some beneficial purpose. In Higgins vs. Iye, 7 Bing. 692, it is held that by the

law of England the person who first appropriates any part of the water flowing through his own land to his own use, has the right to the use of so much as he thus appropriates against any other. In Bradley vs. Shaw, 6 East 207 the doctrine of the superior right of the first appropriater is recognized, and goes even further giving the right of other riparian owners to acquire in the same way a similar priority in the residue left unappropriated by the first taker. To the same effect is 2 Blackstone's Commentaries, 402. These cases would seem to fix the rule that property in water could only be acquired by appropriation, and the first appropriater might take it all, to the exclusion of others upon the same body of water. However, as we proceed, later cases will show that the rights of riparian owners have a more substantial foundation than mere appropriation, and that one riparian owner cannot be deprived of his right to a just amount of the water by being anticipated in its use by his neighbor. The leading modern English case upon this subject is Mason vs. Hill, 5 B & A 1. In this case the defendant erected a mill on his own land. The

plaintiff's grantor, who was the owner of land below on the same stream, and had used the water of the stream twenty years for domestic purposes, gave the defendant a license to erect his dam at a certain point and to take what water he pleased. The defendant availed himself of the license, but the water taken by him was returned into the stream above plaintiff's land. The defendant, without license, diverted the water of certain springs which flowed into the stream, and conducted it into a resevoir for the use of a mill. Later plaintiff erected a mill upon his land, and appropriated to its use all the surplus water not used by defendant. Later he destroyed defendant's dam, and gave him notice not to divert the water. The defendant thereupon erected a new dam lower down, by means of which all the water at times was diverted from plaintiff's mill. Plaintiff brought action for damages. The opinion, which is very thorough and contains a review of all the authorities up to this point, shows that neither the common law nor the civil law affords any support for the mischievous doctrine, as it is termed, that the first occupant or appropriater of

water, by his mere priority, acquires such a superiority of right therein as should deprive other riparian proprieters on the same stream of the benefits to be derived therefrom. Mr. Chief Justice Denman, who wrote the opinion, goes on to show that the Roman law considered water as a bonum vacums, in which anyone might acquire a property; but as public or common in the sense that any one might apply it to the necessary purposes of supporting life, and that no one had any property in water itself, except in that particular part which he might abstract and of which he had the possession, and during the time of such possession only. Upon the particular point as to the rights of the appropriater of water in a stream he says: "The position that the first occupant of water, for a beneficial purpose, has good title to it, is true in the sense that no one can pen back the water nor divert it. In this, as in other cases of injury to real property, possession is good title against a wrong doer. It appears to us that there is no authority in our law, nor so far as we know, in the Roman law, that the first occupant has any right to deprive other owners of land upon the same body of water, of the special ad-

vantages of the natural flow thereof. The principle deduced from this case seems to be that a riparian owner gains no additional or more extensive rights in a body of water to the detriment of others on the same, by being the first to apply the water to a beneficial use. His rights depend upon his riparian ownership, and his prior appropriation is but the exercise of a pre-existing right. If he exceeds his privelege as such riparian owner, he usurps other rights and unless continued so long as to raise the presumption of a grant, it gives him no additional rights in the water. The only practical advantage he gains by such prior appropriation is that in case of a disturbance of his right, his damages will be measured by his beneficial use. To the same effect is Holker vs. Perritt, Law Reports, 10 Ex. 59. It should be said, however, that as soon as a person has appropriated water to a beneficial use, he may sue for any injury done to him respecting such new use. Entry vs. Owen, 6 Ex. 352.

It seems to be settled beyond a doubt that the early English doctrine never gained a foothold in the United States, and it is well settled that mere prior occupancy

or appropriation of the waters of a stream by a riparian owner, can give no exclusive right thereto as against others on the same stream, with the following exceptions in some of the States: 1. Unless the prior occupation is continued for such a length of time as to raise the presumption of grant. Davis vs. Fuller, 12 Vt. 178. 2. Where the common law has been modified by some local custom, usage, or statutory enactment, as for instance, the Massachusetts mill acts. As sustaining the general American doctrine, see Palmer vs. Mulligan, 2 American decisions, 270. Platt vs. Johnson, 15 Johns. 213; Norton vs. Bigelow, 16 American Decisions, 696; Tillman vs. Tilton, 5 N.H. 231; Parker vs. Hotchkiss, 25 Conn. 321; Dennett vs. Kellar, 29 Mich. 420; Angel on Water Courses Sec. 134 and 350; Pomeroy on Riparian Rights, Sec. 6.

It will hardly be necessary to go into a detailed examination of all these very early cases, as they have the same general tendency, and I will therefore select one or two of the leading cases. In Palmer vs. Mulligan, supra, a leading case upon this subject, the facts were

as follows: Plaintiff brought an action for damages claimed to have been sustained to his mill dam by the erection by the defendant of another mill above his, and thus diverting the water. Held, the act of erecting the mill by defendant was a lawful act, and though it injured the plaintiff, he was without remedy. Each one had an equal right to build his mill, and the enjoyment of it will not be restrained because of some inconvenience to the other; and this case emphatically rejects the doctrine that the person erecting the first mill thereby acquired any superior rights upon the same body of water. In Tyler vs. Wilkerson, supra, a case arising out of a similar state of facts; in the opinion, Story J., says: "Of a thing common by nature, there may be an appropriation by general consent or grant. Mere prior appropriation of water without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupation. That supposes no ownership already existing, and no right of use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the

land, and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner admitted by the law, which may be either by grant from all the proprieters whose interests are effected, or by long exclusive enjoyment without interruption, which affords a just presumption of right; and it is well settled that as prior occupancy or use of water does not give exclusive possession, so a man does not lose any of his rights in a stream by mere non-user, nor does such non-user confer any adverse rights upon another." See also Townsend vs. McDonald, 12 N.Y. 381.

From an examination of the cases cited, I think we can with safety lay down the following, as the doctrine of both England and the United States . The waters of streams and inland lakes and ponds, are common alike to the use of all riparian proprieters upon its borders. This extends to lakes wholly inland and territorial. Each proprieter may use the water for all reasonable purposes, provided that he does not interfere with the public easement of navigation, in all lakes and streams navigable. But he must after its use,

return it without substantial diminution in quantity to its natural bed or channel before it leaves his own land, so that it may reach the adjacent proprieters in its natural condition . No priority of use or occupation can give him any higher or more extensive rights that these, as against other proprieters higher or lower upon the stream, or abutting upon either side of him, upon the shores of the lake. More extensive or exclusive rights than these against other riparian owners, can only be acquired by grant from them, or by prescription, which presupposes a former grant. See Smith vs. Rochester, 92 N.Y. 463. However, the doctrine above stated as to the rights of riparian owners, does not apply to the vast fresh water lakes or inland seas of this Country, nor to the streams forming the boundary of the States.

It will be remembered that I gave two exceptions to the rule that priority of appropriation gives no superior rights. The second exception was where it is modified by local custom or some statutory enactment. The best example of the latter is in Massachusetts. From a very early period in that state, statutes have existed

providing for the encouragement of mills, the effect of which has been to modify somewhat the rights of riparian owners. These statutes authorize one having a mill site upon his lands to flow the lands of other proprieters on the same body of water for the purpose of getting power sufficient to run his mill. The effect of these statutes seems to have given the riparian owner who first appropriates the water of a stream to mill purposes, the right, by virtue of this priority, to maintain his dam against others, although it may prevent the erection of mills by them. Carey vs. Daniels, 41 American Decisions, 532. Gould vs. Water Co. 13 Gray 442. This exclusive right must be reasonable, however, and this superiority of right exists only to the extent of the actual appropriation and use. The unappropriated residue may be the subject of a new appropriation by others; but the later decisions of that State have so limited the doctrine as to make it difficult to discover any essential difference between it and the ordinary rule. In Ellen vs. R. R. 10 Cush. 193, it is laid down that each riparian owner has a

right to a just and reasonable use of the water which flows through his land, and so long as he does not wholly divert or appropriate it, or does not appropriate any more than is reasonable, other riparian proprieters cannot complain; and in Thurber vs. Morton, 2 Gray 352, it is said in determining what is a reasonable use, a just regard must be had for the force and volume of the water and the state of improvement of the Country, and general usage in similar cases. Maine and Minnesota have statutes similar to these, and similar doctrines prevail there. It is to be borne in mind that these rules are peculiar to the States mentioned, and are solely the result of statutes and are not recognized in other states. With this, I think, we have discussed the question as to title to waters of a lake or pond, and have shown that mere priority of appropriation, as such, between riparian proprieters, gives no exclusive rights or priveleges. We will now pass to a discussion of the question as to the title to land under lakes and ponds as between riparian proprieters.

CHAPTER II.

In discussing this question, it naturally falls into two divisions: 1. Title to the beds of the lake or pond, and, 2. Lakes and ponds as boundaries; but as the first naturally leads into the second, they will be discussed in one Chapter.

In considering this head, there will be found a great diversity of opinion, especially in the United States, while in England the question does not seem to have been given much attention; in fact, in some respects it may still be considered as an open one. This may not seem so strange, as England proper contains but few strictly non tidal lakes, and they are of small importance. The question regarding the rights of the Crown to the land under lakes, seems to have first come up in 1863 in the case of Marshall vs. Navigation Co., 3 Best and Smith, 732. The plaintiff in this case was the possessor of a right of fishing by grant in certain parts of Wellswater Lake, in the north of England. The defendant company, being incorporated for the excursion business, started to run their steamboats on the lake,

and did so for a time. The lake being shallow in places, the steamboat company, by allowing their vessels to dump their ashes, cinders, refuse etc. in the water, eventually drove the fish away. Defendant justified on the ground that the lake was a public highway and that they navigated by license obtained from the riparian owners along shore. In considering the case, Wightman L, says: "Whether the soil of lakes, like that of fresh water rivers prima facie belongs to the owner of the lands, or of the manor on either side of it, or belongs prima facie to the King, in the right of his prerogative, it is not necessary to determine. It is clear, however, that the soil of the land, covered with water, may together with the water and right of fishing therein, be especially appropriated by a third person whether he have the land or not, adjacent thereto on the borders thereof." Accordingly the question stood in this condition until 1878, when the case of Bristow vs. Cormican, Law Reports 3 Appeal cases 643. Plaintiff here claimed the right to fish extending over the whole of Lake Lough, one of the largest non-tidal lakes in

Ireland, including a place where it was claimed defendant trespassed. Plaintiff based his claim upon a grant from Charles II. in 1660 and upon certain leases since made by persons claiming title under the grant. It was positively laid down in this case that the Crown has no de jure right to the soil or fishings of an inland non-tidal lake, and a general grant by the crown of a right of fishing in a lake is not, without more, sufficient to establish title thereto; and t where there is no evidence of acts of possession by the grantee at the particular point in dispute, can have no effect. There is no authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. While these cases do not establish much one way or the other regarding the particular point in question, they do establish two propositions which are not fully recognized in this Country. 1. That the title to the bed of a lake or pond is not in the soverign authority. 2. That the bed of a lake and the shore which bounds it, is susceptible of distinct ownership by different persons.

In coming to the question in the United States, it becomes one of vast importance, especially in those States which, like New York, are dotted throughout their borders by lakes large and small. Whether the line of low water mark or high water mark is to be considered as a boundary, is a question as to which there are differences of opinion throughout the States. If the bank owners do not own the bed, it must be conceded that it is owned by the State. Wherever the United States was the original owner, the right passed to the State on its admission to the Union, with all other rights pertaining to eminent domain. Whether the state owns it as proprieter or only as soverign, is, perhaps, one of the main points. If it owns the soil as proprieter, it may sell it for private improvement and occupation, and the bank owner may be cut off from any use of the water in connection with his estate, and be deprived of the benefits which he had reason to suppose he had acquired absolutely by his purchase. But if the State owns it as soverign merely, under the right of eminent domain, it is to be preserved as a right of navigation, merely for the

common enjoyment of all the people. Where lakes are taken possession of under the power of eminent domain, questions of property rights connected therewith are bound to arise. In those states where the gathering and storing of ice for use in summer and for shipping away is carried on, the question is one of great practical importance.

It may for a moment be profitable to discuss the great navigable lakes in the United States, or as they are more properly called, the great inland seas. As to the shores of the sea and rivers as far up as the tide ebbs and flows, the common law of England provided that the ownership of lands went to the high water mark, and no further. The shore proprieters had certain rights termed riparian, but his title stopped where the sea began, or at that point where the highest tide carried the water, and the Crown owned the strip subject to overflow by the tide; but as to fresh water streams, not navigable, the title of the proprieter on either side extended to the middle or thread of the stream.

In this Country the great lakes are regarded as

public property, and not susceptible of private ownership any more than the sea. 3 Kent's Commentaries, 429. In Canal Appraisers vs. The People, 17 Wend. 571, in the opinion it is said: "A different rule than that of the common law must prevail as to our large navigable lakes, which are mere inland seas, though there is neither ebb nor flow of the tide, and also as to those lakes and streams which form the natural boundaries between us and a foreign nation. Our own local law appears to have assigned the shores down to the low water mark, to the riparian owners, and the beds of the lakes to the public." It is made to differ from a sea boundary because the space between high and low water mark on the ocean is subject to the overflow by the tides, and is therefore useless for all purposes of agriculture; but the great lakes have no tides, and the difference between high and low water mark is not periodical, and although they do sometimes overflow their banks, the waters recede again, and only overflow at long and irregular intervals, so that in the mean time the land can be used for tillage and pasture. R.R. vs. Valentine, 19 Barb. 484. But in Ledyard vs. Ten-

Eyck, 36 Barb. 102, it is held that a lake five miles in length and one mile in width would pass under a grant of a large tract of land which included it within its boundaries, and in Wheeler vs. Spinola, 54 N.Y.377, it was held that the rule that proprieters of land bordering upon streams of water in which the tide ebbs and flows own only to high water mark, is not applicable to a case where, by cutting a channel between a pond and a body of salt water, the water of the former becomes salt and the tide ebbs and flows therein. In such case the rights of the riparian proprieters are not affected thereby.

We will now pass to a discussion of the smaller lakes and ponds, in which we have a variety of holdings.

The question regarding the smaller lakes and ponds in this State, with regard to the boundaries of the riparian proprieters thereon, may still in some respects, by regarded as an open one. Lands under the waters of navigable lakes seem to be placed on the same footing as lands under the water of navigable

rivers, and it requires a specific grant to enable the riparian proprieter to go beyond the shore. Canal Co. vs. People 5 Wend. 427. It may be said that by Statute in New York, (1 Rev. Stat. 573), the State's title to land under navigable waters is held in trust for the owners of the up-land as well as for the public, and the State can only convey the lands under such waters, whether lakes or tide-waters, to the owner of the adjoining land. See also Rumsey vs. R.R. 114 N. Y. 423; Wright vs. Eldred, 46 Hun 12.

It is hard to lay down a rule as to where the line shall be drawn. What lakes shall be treated as coming within the settled rule, and what as being within the rule applying to fresh water streams. Are you to follow the rule in the case of the Great Lakes, and stop at the low water mark, or take the rule as applied to streams, and carry the proprieter's line to the center. Navigability can hardly be said to be a fair test, for all ponds, even, are more or less navigable. When the State makes a grant of land which includes within its bounds the whole of a pond or lake, of course it grants to the individual the bed of the lake. Ledyard vs. Ten

Eyck, supra. But if the grant is bounded by the lake, the line could hardly be carried further than the margin, as the rule protecting the State from any implication in its grant would produce this result. Now let us take a case for instance, where a grant of land is made including a lake as large as lake George in this State, or Oneida Lake, or any of the lakes in the central part of this State, midway in size between the Great Lakes and the smaller ones. Now conceding to the grantee ownership in the bed of the lake, how are his deeds bounded by the bed of the lake, to be construed. Does his title extend to the water line or further ? If further, where will the boundary be. There is no stream; there can, therefore, be no ownership as at common law under fresh water rivers. In this case, necessity would compel the application of the rule as adopted in R. R. Co. vs. Valentine, to wit, lands bordering upon a lake go to low water mark; but this rule requires that ownership of the bed of the lake should be held subservient to the title to its shores. The land owners title goes to the water; if it gradually sub-

sides, as it does in almost all lakes, the shore owner's line gradually enlarges, and he cannot therefore, be cut off from the Lake by a grant to another person. His boundary line is always the water, so that it may be said that there is a covenant running with the land that the grantor will hold the title to the bed of the lake, subject to the right of the shore owner always to be bounded by its waters; as it shrinks in size, the shore owner's estate increases by accretion. The grantor cannot do what the State asserts its right to do respecting lands bounded by the sea or the great rivers, to wit, sell the strip between high and low water mark; because any attempt to use the land under water in front of a shore owner's parcel, would conflict with his boundary, or else limit his rights as a riparian owner. Now while the shore owner is bounded by the pond or lake, he must have certain definite and ascertained rights, according to this rule. He is entitled to free access to his boundary line, the water. He has the exclusive right of access to the water over his own land, and if he can make it useful to him for any purposes of navigation he may

do so. He may fish and cut ice upon it. These are the rights incident to his boundary line, bought and paid for when he pays for the land, and ought not to be taken from him even under the right of eminent domain, without compensation. These are rights which are appurtenant to the land, and cannot be taken away. While there is no positive authority in New York, settling the question regarding very small lakes, the decided weight of authority tends to support the rule as here given. These deductions, however, as here laid down, are perhaps incompatible with the right claimed by the State to sell to strangers the land between high and low water mark. In the case of small lakes, there is no such strip of land; the shore owner's title going to the water. We have seen that it would be incompatible to the shore owner for the proprieter who had sold to him, to sell to another land under the water, and the person so purchasing would take only subject to the rights of the owner of the shore. But even allowing that seperate ownership of the bed and the shores exists, what is the result ? The riparian owners have the right to build docks out to

the line of navigability, and they cannot be cut off from access to the water. What title then, can a stranger take to land under the water ? He takes simply the bare title, with all the rights connected with ownership granted away. The land acquired is covered with water, which cannot be made useful to him, and the condition of his tenancy is that is shall so remain covered with water, for in just proportion as it ceases to be so covered, it ceases to be his. Therefore it will be seen that whether the owner of the shore be bounded by the lake, as is upheld by this rule, or be held to own the bed of the lake, there is but very little difference in his rights or the value of his holding. Perhaps, if anything, his dominion over the water is more perfect when he is bounded by it, than if he should be held to own the fee in the land beneath its surface. He may fish the whole lake under a sort of common right of piscary, created by owning the lands upon its borders, while if his right depended upon the ownership of the soil beneath the water, he would be limited to that part of the lake the soil of which was within his bounds.

His right to cut ice is a common right which he has with the other shore proprieters. If his right to cut ice depended upon his title to the bed of the lake, he would be strictly confined within his own lines. There is a very close analogy between the small lakes and the old English common lands. The common lands were not for the use of the public in general, except where prescription has established a highway across them, but for the use of the tenants of the manor, and the right to use them was strictly appurtenant to the tenancy of other lands held in severalty. With the march of population, it has become necessary to divide these lands, and destroy the right of common use in them. In such cases the vested rights of the tenants of the manor have been extinguished by purchase. Should any of these small lakes, therefore, be taken under the right of eminent domain, compensation would have to be made to the shore proprieter. It must be borne in mind, however, that a grant of land, which included expressly the bed of the lake, would of course give the grantee an estate in the land under the water. I have endeavored

to collect all the authorities in New York state, which will be found to throw any light upon this matter: Appraisers vs. People, 5 Wend. 1; Ledyard vs. TenEyck, 36 Barb. 102; Canal fund vs. Kendall, 26 Wend. 418; R.R. vs. Valentine, 19 Barb. 484; Kingman vs. Sparrow, 12 Barb. 201; Morgan vs. Kine, 35 N.Y. 454; and in general, see Dillingham vs. Smith, 30 Maine 370; Strange vs. Biermuller, 34 Ohio 492; Payne vs. Woods 101 Mass. 160; and Angell on Water-courses, 41 - 43.

We will now proceed to discuss the rule as it is found in the different states. Owing to the length of this thesis, I will not attempt to give a detailed account of the rule in each State, but will simply pick out one or two of the leading cases.

In Fletcher vs. Phelps, 28 Vt. 257, it was held that lands bounded on Lake Champlain and upon the streams which empty into that body of water, and ordinarily maintain the same level as the waters of the lake, extend to the edge of the lake at low water mark; but in a later case, Austin vs. R.R. 45 Vt. 205, it was held that the bank owner, in the case of small lakes and ponds, has no appurtenant right in the water which

will enable him to maintain ejectment against one who would take possession, and fill in and occupy the bed of the pond below the water line in front of him.

In Illinois, a deed of land in which one boundary was described as following the course of Lake Michigan was held to bound the land by the line at which the water usually stands when free from disturbing causes. Seaman vs. Smith, 24 Ill. 521. This rule is followed in Ohio, with a reservation in regard to the rights of the riparian owner to build out beyond his strict boundary line for the purpose of affording such convenient walls and landing places in aid of commerce, as do not obstruct navigation. Sloane vs. Biermuller, 34 Ohio State 492.

In Wisconsin the boundary is held to be the ordinary low boundary line, but with appurtenant water rights. The Court says; in Delaplaine vs. R R. 42 Wis. 425: "But while the riparian proprietor only takes to the water line, it by no means follows that he can be deprived of his riparian rights without compensation. These are private rights, incident to the ownership of the shore which he possesses distinct from the rest of

the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for the purposes of gain or pleasure. It is evident from the nature of the case, that these rights of user and exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It may be remarked that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself, adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights is the ownership of the bank or shore. In such ownership they originate. They exist though the fee of the lake be seperate from the ownership of the shore. If the proprieter owns the bed of the stream or lake, this may possibly give him some additional rights; but his riparian rights do not depend upon that fact, strictly speaking."

In Michigan, we come to the first radical diversion from the general line of authorities. In Rue vs. Ruddington, 10 Mich. 125, it was held that the rule appli-

cable to Lake Muskegon, a small lake separated from Lake Michigan by an outlet only, is, that the ownership of the land bounded upon the lake carries with it the ownership of the land under the water, and in the later case of Clute vs. Fisher, 65 Mich. 48, it was held that the owner of a subdivision of land upon an inland lake, owns the soil under the water of such lake, which would be included within the subdivision if its lines were fully extended. But the practical difference between this ruling and that of Wisconsin is not so great as might at first seem, because if the bank owner is the proprieter of the bed also, he is limited in the use of it only by the public right; if not proprieter of the bed, he may still make use of it, limited only by the general public right of navigation. The State or proprieter cannot either by regulation or sale, take from him his appurtenant rights in the water, or in the navigation thereof, without compensation. In Wisconsin it is also held that the rule of bank ownership is the same, whether the water is susceptible of navigation or not. Boorman vs. Sunnocks, 42 Wis.233.

Nevertheless, if accretions are formed on the shore of a non-navigable pond or lake by slow and imperceptible degrees, or if the bed is uncovered by the gradual receding of the waters, the land thus made or uncovered, belongs to the proprieter of that which adjoins it. Therefore if a lake or pond gradually disappears altogether, the adjoining proprieters will become owners of the whole bed, and would find their possessions increased several times the original size. Jones vs. Johnson, 18 Howard 156. Also see Belding vs. State, 25 Ark. 120; Municipality vs. Cotton press, 18 La. An. 122; and Hodgers vs. Belden 95 No. Cal. 331. But the question as to the gradual or slow disappearance of the waters is not such an important matter, for generally the lakes and ponds gradually recede if at all, and whether under the exceptional ruling ,as in Michigan and one or two other states, or the general holding of all the jurisdictions, their beds come at last to be private property without any grant from the State.

Maine holds in accordance with the New York doctrine, although not without a conflict in her decisions,

In the early case of Bradley vs. Rice, 13 Maine 198, it was held that where a lake had been raised by artificial means, so as to permanently extend beyond its natural limits, a grant of land bounded by the lake should be limited by its artificial margin, in its present condition, or as it existed at the time of the conveyance. Later, in Wood vs. Kelly, 30 Maine 47, ~~it was held~~ upon a similar statement of facts it was held that a grant bounded by the lake included all the land which was uncovered when the water was at its lowest.

Indianna seems to have gone the farthest of any of the states holding adversely to the general rule. In Turner vs. Rice 121 Ind. 51, it was held that non-navigable lakes must be brought within the common law rule regarding now navigable streams, and purchasers take title to the center. In Ridgeway vs. Ludlow, 58 of Ind. 48, it was laid down that title by adverse possession to land bordering upon a lake gives title to the center. Ohia also holds with Indiana and Michigan, although not without strong dissent, and the rule may be re-

garded as not well settled either way. In Lemback vs. Nye, 8 L.R.A. 227, it was held that where one owns a tract of land which surrounds a lake, and conveys a part bordering thereon, the presumption is that the title of the purchaser extends to the center thereof. Two judges, however, dissented in this case.

In New Jersey they apply the somewhat exceptional test, that of the ebb and flow of the tide, to determine whether waters are private or public.

In some of the western states, notably Nevada and Colorado, it is laid down that the doctrine of the modern riparian rights is unsuited to the condition of the country, and the rights of the adjoining proprietors are to be determined by the application of the old doctrine of prior appropriation. Reno vs. Sherman, 4 L.R.A. 60 and 767.

I think, from a reading of the foregoing cases, that the prevailing doctrine in this Country, regarded as particularly applicable as to large lakes, and qualified somewhat in the case of artificial ponds, to be as follows: That while a general grant of land on a river or

stream which is not navigable extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge, and this rule has the dupport of the following states: New York, Maine, New Hampshire, Wisconsin, Illinois, Vermont, Massachusetts and Connecticut. In Pennsylvania a pond or small lake is considered an entirety, the whole or none of it being private property. Reynolds vs. Commonwealth, 93 Penn. 458.

CHAPTER III.

RIPARIAN RIGHTS.

Riparian rights, according to the strict meaning of the term, are such as follow or are connected with the ownership of the banks of streams, rivers, or lakes. Those whose lands border upon tide waters are called littoral proprieters, and there appears to be no word of sufficiently broad meaning to include both riparian and littoral, although each is sometimes used to denote the other. The distinction between tide waters and fresh, or between public and private waters is not necessarily a material question in determining questions relating to riparian rights, since riparian rights proper depend upon the ownership of lands contiguous to the water and are the same whether the proprieter of such lands owns the soil under the water or not. Gould on Waters, Sec. 148. It is of course necessary for the existence of a riparian right, that the land should come in contact with the water, but lateral contact is as good as vertical. Casemore vs. Richards, 7 House of Lords cases 349.

In discussing these rights they fall under two heads; 1. Private rights; 2. Public rights, or those gained by custom and long usage. The private rights are divided into (1) Access; (2) Right to cut and take ice; (3) Wharfage; (4) Fishing; (5) Accretion. Public rights are divided into (1) Navigation, and, (2) The quasi public right of fishing, in several of the states.

The leading case upon the question of access is that of Delelaplaine vs. R.R. 24 Am. Rep. 386. A railroad company in this case constructed its road to Lake Monona, a navigable body of water in Wisconsin. By doing so they cut off the riparian owners from access to the lake, and left in front of their land a pool of stagnant water. It was contended by the company that because it was authorized by its charter to construct its road between two certain points, it had the right to occupy, in the construction of its road-bed, any land in the state between these points. By the Court: "It may be conceded that the company had the right by its charter, to occupy the bed of the Lake in the construction of its road; but this does not imply an intention on the part of the legislature to relieve the company from its liability in

case of injury to a riparian owner. The legislature doubtless intended that the company, in the execution of its chartered power, would make compensation for any damage inflicted upon any land owner, where liability was imposed at common law. The act of the railroad in constructing its road, plainly shows an interference with a natural flow or action of the water, an obstruction of access to and from the lots of the plaintiff to the body of the lake. It is therefore, a permanent injury to the property, and a reduction of its market value. We are at a loss to understand why the plaintiff should not recover such damages for this infringement upon and destruction of his riparian rights, as he may prove he has actually sustained. These riparian rights are undoubted elements in the value of property thus situated. If destroyed, can anyone claim that the plaintiff has not suffered a special damage in respect to his property, different both in degree and kind, from that sustained by the general public". This case is also in accordance with the English line of decisions upon the subject; see Lyon vs. Fish Monger's Co. Law Rep. L App.

Cases, 662. Also Steamship Co. vs. Engine Co. 12 R.I. 348; Brisband vs. R.R.Co. 23 Minn. 114; Yates vs. Milwaukee, 10 Wall. 497.

On the other hand, the very early case of Gould vs. R. R., 6 N.Y. 522, which was decided prior to Yates vs. Milwaukee, 10 Wall. 497, held that as the owners of land joining a navigable river have no right of property in its waters, or in its shores below high water mark, they are not entitled to compensation where a railroad constructed under a grant from the legislature cuts off all communication between such lands and the river. It is claimed that this doctrine resulted in New York from the civil law doctrine, applicable to the Hudson, which was the river in question. This doctrine which rests upon the ground that the injury suffered by the riparian owner, though greater in degree, is the same in kind as that sustained by the general public, and by those who not being riparian owners, have occasion to approach the river over that part of the bank occupied by the road. This doctrine is supported by Tomlin vs. R.R. 32 Iowa 106, Strauss vs.

R.R. 34 N.J.Law 532.

Where it is conceded however, that riparian rights are property rights, the question of their taking without being compensated for, is well settled; and it may be said that the early case of Gould vs. R. R. has been so encroached upon by later decisions in New York that it can hardly be said to be of much authority at the present day, or at least very doubtful. Strong vs. R.R. 90 N.Y. 122.

The right of riparian owners upon navigable rivers and lakes, to construct in shoal waters in frontof their land, walls, piers, landings etc. in aid of navigation, is so well settled it hardly needs much space. This right, however, is always subject to the qualification that the structures must not pass beyond the point of navigability. It is held to be a riparian right, not dependant upon title to the bed, but upon title to the bank. Its exercise may be regulated or prohibited by the State, but so long as it is not prohibited it is a private right, derived from a passive or implied license by the public. Gould on waters, Sec. 179.

The right of fishing may depend to a great extent

upon the question whether the ownership of the bed of the lake or pond is in the state or the bank owners, thereby becoming either public or private. It is generally held that the right of fishing follows the ownership of the bed. If that is in the state, the fishing is public, if not, it belongs to the bank proprieter. Beekman vs. Kramer, 44 Ill. 447. In Cobb. vs. Davenport, 33 N.J. 369, the whole subject is very fully considered, and it is held that while the right of fishing is prima facie, exclusively in the owner of the soil, yet it is not inseperable therefrom, but may be acquired distinct from the ownership of the land beneath the lake, and the fact that the public in general, for a long period of time, were accustomed to fish in a certain lake without molestation, simply tends to establish a customary right in all the inhabitants in that locality to fish in these waters, if a right to fish could be established by proof of custom; but the right of fishing is not a mere easement or right of user without derogation of the property; but as a profit or a taking of the property itself. Therefore, the right of fishing cannot

be claimed by custom, but must be prescribed for in a "Que" estate, (The term Que estate, as used here, is a term used in pleading, particularly in claiming prescriptions, by which it is alleged that the plaintiff and those former owners whose estate he has, have immemoriably exercised the right claimed. Black's Law Dictionary. In other words, if one claims a prescriptive right to an easement in another's lands, by reason of owning or occupying land to which such right is appurtenant, he is said to claim a Que estate, and it is only in this form that a claim of a profit a pretendre by prescription can be sustained. Profits a pretendre differ from an easement, in that the former are rights of profit, and the latter are mere rights of convenience without profit.)

Upon the question of the right to cut and take ice, the rules conflict somewhat. In a few of the states it is governed by the same rules applicable to fishing. Millriver vs. Smith, 34 Conn. 462; Lorman vs. Benson, 8 Mich. 18. It is a question of as great importance, perhaps, as any regarding riparian rights, and will therefore bear little detail discussion. It may be

laid down as a fundamental rule, that the owner of an easement to overflow another's land, is not entitled to the ice which forms on the water covering the land; it belongs to the owner of the fee. The owner of a servient estate has a right to all the profits which may arise from the soil, and may make such use of the soil as is not inconsistent with the easement. As was observed in the leading case of Hydraulic Co. vs. Butler, 91 Ind. 134, "Notwithstanding such easement, there remains with the grantor the right of full dominion and use of the land except so far as a limiting of their ownership is essential to the fair enjoyment of the easement granted. Neither is it necessary that the grantor should expressly reserve any right which he may exercise consistently with the fair enjoyment of the grant. Such rights remain with him because they are not granted, and for the same reason the exercise of any of them cannot be complained of by the grantee, who can claim no other limitations upon the rights of the grantor but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment. Easements do not take from the owner of the fee

the right to make any profitable use he can of his property, not inconsistent with the dominent estate. The right to back or pond water on the land of another, whether acquired by statute or prescription, gives no right to the land itself, nor the profits which a use of, not injurious to the easement, will produce. See also Paine vs. Woods, 108 Mass. 160; Baker vs. Frick, 45 Md. 339; Mason vs. Hill, 5 B & Ad. 1; Julian vs. Woodsmall, 82 Ind. 568. In a Maine case it was held that the owner of a mill dam on a navigable stream, who did not own the bed of the stream above the dam, has a qualified interest in the water, but none in the ice formed upon it, and that the riparian owner is the owner of the ice in such case, though the ice privelege is made by the flowage. When the owner of a mill dam maliciously draws the water from a pond, and thus destroys the ice field, he is liable in damages to the riparian owner, who owned the land under the pond. Stephens vs. Kelly, 78 Maine 445. In the earlier case of Dwyer vs. Morris, 72 Me. 181, it was held that a deed of a tide mill privelege, mill dam, and wharf privelege, and

the right to flow a creek and adjoining lands, and all rights connected with and belonging to said mill privelege, gave the grantee no right to cut ice nor title to the ice formed upon a fresh water pond raised by changing the dam so as to exclude salt water.

In New York, a case of some interest arose upon the following facts: One S., at the time of bringing the suit, was the owner of the land upon which the dam in question was raised, and the land covered by the waters of the pond, except a small portion owned by O. O by deed conveyed to the grantor of S. the right and privelege to overflow so much of the land above mentioned as is now or at any time after, may be overflowed by means of the said dam, or by any other dam which may be erected in place of this one. Later, M and R, of whom plaintiff was survivor purchased all the ice in the pond, formed and to be formed, from S. Previous to the gathering of the ice in the pond, a freshet occurred which carried away a large part of the ice formed and loosened that which was in controversy from the shore, and would probably have swept that out also, had not plaintiff, by holes cut therein, fastened it to the

shore and thus detained it. After the plaintiff had commenced to remove the ice, the defendant went to this part of the pond over O's land, and by permission of O, took a large quantity of ice, though forbidden by plaintiff, and also opened a channel across the pond and over that part of which S had title, and floated the ice so cut by him through such channel and gathered and sold the same. It was held that the plaintiff was entitled to the ice formed in the water overflowing the lands of the owner, and could recover the ice which had been taken therefrom by a third person by permission of such owner. It was laid down by the Court that the manner of the water's use and the mode of its application to his own use, was not restricted by any deed conveying title which he held, nor by any rule of law except the general one that the flow of a natural stream shall not be so obstructed as to deprive owners below of the benefits of use and enjoyment . So long as the owners below were not interfered with, S, plaintiff's vendor,as the former owner of the basin which held the water, had the right to use such water for his own profit. He could use its

momentum to propel machinery, and let that right to others. He could use the water for farm and domestic purposes, and let and rent that right to others. All these consequences follow from the act of appropriating them. The land basin which held them was his, as owner in fee, or for use. By his dam he had filled the basin, and the water thus gathered or held there was his, subject only to the exception that the beneficial enjoyment of the owners below should not be interfered with, just as much as if he h ad gathered them for his own use and benefit in a tank or cistern which had been constructed for that purpose. The right to use and sell water in its liquid form is only a part of his right. When the form of the water is changed by cold into ice, his rights are the same. S., the plaintiff's vendor, had the right to use it in its congealed form, and the same right to sell it and permit it to be gathered before it returned to its liquid state as he had to use and dispense it when in the latter condition. There can be no difference as to his rights, growing out of the state of the water. Myer vs. Whittaker, 55 Howard's

Practice, 376, overruling Marshall vs. Peters, 12 Howard's Practice 218.

On the other hand, in Manufacturing Co. vs. Smith, 34 Conn. 462, it is laid down that the owners of a mill pond own the ice formed upon it, and the riparian proprieters have no right, as owners of the soil, to remove it.

Where a person takes the ice in the water over the land of another, to which the owner of the land has the exclusive right, the measure of damages in trespass for such wrongful taking is the value of the ice as soon as it is a chattel, that is, when scraped, sawed, cut, and ready for removal.

Public Rights: In certain States, by custom, they have what is known as common, or quasi-public rights in lakes and ponds. For instance, in Michigan, it has always been customary to permit the public to take fish in all the small ponds and lakes of the State. Therefore, in that State it is no trespass, in passing upon another's land, to take fish from the lake or pond, unless the latter has given notice that such conduct will not be allowed. Marsh vs. Colby, 39 Mich. 626. State vs.

Company etc. 48 N.H. 250. Also see Cobb vs. Davenport, 32 N.J.Law 369, contra. In Ohio it is held that the right of fishing in Lake Erie and its bays, is not limited to the proprieters of the shores, but that the right of fishing in these waters is as public as if they were subject to the ebb and flow of the tide.